No. 4131

United States
Circuit Court of Appeals
For the Ninth Circuit

WESLEY LEROY SISCHO,
Plaintiff in Error,

—VS—

THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Written Error to the United States District Court of the Western District of Washington, Northern Division.

HONORABLE EDWARD E. CUSHMAN, Judge

Brief of Wesley LeRoy Sischo, the Plaintiff in Error

W. E BARNHART,
Attorney for Wesley Leroy Sischo,
the Plaintiff-in-Error.

Fremont Colleague. Phone Melrose 0542

No. 4131

United States
Circuit Court of Appeals
For the Ninth Circuit

WESLEY LEROY SISCHO,
Plaintiff in Error,

—vs—

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Wesley LeRoy Sischo, the Plaintiff in Error

Upon Written Error to the United States District Court of the Western District of Washington, Northern Division.

STATEMENT

WESLEY LEROY SISCHO, the Plaintiff-in-Error was charged with the crime of violating the Narcotic Drug Import and Export Act.

The Plaintiff-in Error was tried and found guilty April 20th, 1923; and a motion for a new trial was made and denied(P. R. 6), whereupon the Court sentenced him to seven years imprison-

ment and a fine of Four Thousand Dollars ($4,000). Assignment of errors made. (P. R. 12)

This appeal is based upon errors pertaining to the cross examination of Plaintiff-in-Error and arguments made by attorneys for Defendent-in-Error before the Jury.

All the testimony related to the issues herein involved is set in the bill of exceptions and is as follows:

> BE IT REMEMBERED that in the trial of this cause on the 19th day of April, 1923, the above entitled court before the Honorable Edward E. Cushman, one of the judges of said Court, sitting with a jury, the plaintiff appearing by C. E. Hughes and Charles P. Moriarty, Assistant United States Attorneys, and the defendant appearing in person and by John F. Dore and John J. Sullivan, his attorneys; a jury was empaneled and the following proceedings had to wit:

TESTIMONY OF WESLEY LEROY SISCHO

On cross-examination by Mr. MORIARITY.

Q. Were you ever convicted of a crime?
A. Yes sir, I told about that.
Q. In this court?
A. No, not in this court.
Q. In the Federal Court?
A. Yes sir.

Q. Before Judge Neterer?
A. Before Judge Neterer.
Q. For this same offence?

Mr. DORE. I object as incompetent, irrevalent and immaterial; it is improper to ask that.

The COURT. Objection sustained.

ARGUMENT TO THE JURY.

Mr. HUGHES (Assistant U. S. Attorney.) A man who served time—

Mr. DORE. I object to that.

The COURT. Yes.

Mr. SULIVAN. I will ask the Court to instruct the jury to disregard it.

The COURT. Yes.

Mr. HUGHES. A man who has been convicted of a felony.

Mr. DORE. I ask the Court to instruct the jury to disregard that.

The COURT. As I recall, he said he had been convicted of an offence.

Mr. DORE. No testimony that it was a felony at all.

Mr. HUGHES. A man who was dealing and selling opium.

Mr. DORE. I object to that; there is no testimony that he was dealing in and selling opium.

The COURT. Objection overruled.

CLOSING ARGUMENT.

Mr. MORIARTY. Are you going to take the word of seven or eight reputable witnesses, or the word of a convict?

Mr. DORE. "Or the word of a convict." I ask your Honor to instruct the jury to disregard that remark.

The COURT. Motion denied.

JUDGE'S INSTRUCTIONS.

"I will further instruct you on the weight of evidence and the credibility of witnesses. There has been evidence here that the defendant had incurred a prior conviction. You are not warranted, for that reason, to convict him in this case, if you have a reasonable doubt of his guilt in this case. No man should suffer punishment twice for the same offence, if you convict him in this case merely because he has suffered conviction in another case; that is what you would be doing. At the same time the law permits such evidence to be given, where a defendant goes upon the witness-stand; it permits such evidence to be given in order that you may weigh and determine his credit as a witness, because it is only human experience that a man who has been convicted of an offence, in the general average, is not dependable, and the same reliance is not to be placed upon his statements, either on or off the

witness-stand, as it is in the case of a person who has not suffered such misfortune."

ARGUMENT

The record so plainly speaks for itself that little, if anything, can be added by argument.

Not only one, but both counsel for the Government persist in their opening and closing argument before the jury, over objections, in making statements pertinent to the prosecution and wholly outside the evidence admitted.

"A man who has served time. A man who has been convicted of a felony. A man who has been dealing in opium," says Mr. Hughes in his opening arguments to the jury all over objection of opposing council.

"Are you going to take the word of seven or eight reputable witnesses or the word of a convict?" says Mr. Moriarty in his closing argument to the jury, likewise over the objection of opposing counsels.

It is a well established rule that it is sufficient to reverse a judgment for the court to suffer counsel against objection to state facts pertinent to the issue and not in evidence.

State vs *Blodgett* 92 *Pac. Rep.* 820.

Upon the argument the counsel for the State spoke of one of the defendant's witness as a scoundrel, who had served a term in the penitentary. Held that, as there was no proof to sustain the words, it was a reversible error to refuse appellant's request to have them corrected.

Schlotter vs. State 127 *Ind.*, 493.

The errors of a Judge in matters of law as well as the errors of the jury in matters of fact alike constitute valid grounds for a new trial.

Federal Cases No. 11974-*A*
Rochell et al vs. Phillips.

As to improper cross-examination of defendant and improper remarks of the United States Attorney, See—

Paquim vs. U. S. 251 *Fed.* 579-80.

The prosecuting attorney should not be allowed to argue a criminal case to the jury outside of the record.

McCormick vs. the State L. R. A. (*N. S.*) 1916-*F Page* 382. *Tenn.*

The District Attorney made an improper argument not suported by the testimony, which was to the great prejudice of the defendant's rights, and

the Court erred in not arresting the judgment and granting the defendants a new trial.

Latham vs. United States 1916-*D L. R. A.* (*N. S.*) 226 *Federal Page* 420. *See also Fielding* 46 *L. R. A. Page* 641.

Nothing short of prompt disapprobation by the Court of the improper remarks of the prosecuting attorney in the heat of a trial and clear satisfaction that the injustice thereby done has been remedied can rescue a case from error on appeal or from a new trial on motion of the party against whom it was committed.

Scott vs. State 110 *Ala.* 48-20 *Page* 468.
Martin vs. State 63 *Miss.* 505.

We submit that the record shows the Plaintiff in Error is entitled to a reversal. The argument of counsel being so plainly unwarranted and so improper as to be clearly injurious to the accused.

Respectfully Submitted,

W. E. BARNHART,

Attorney for Plaintiff in Error.